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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., - Petitioners,

versus

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL., - - - - - - - Respondents.

MEMORANDUM REPLY FOR PETITIONERS.

J. V. NORMAN,
Counsel for Petitioners.

Dated at:
Louisville, Ky.,
November 23, 1936.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 100.

W. P. BROWN & SONS LUMBER CO., ET AL., *Petitioners,*

v.

LOUISVILLE & NASHVILLE RAILROAD CO.,
ET AL., - - - - - - - - *Respondents.*

MEMORANDUM REPLY FOR PETITIONERS.

At the time of the preparation of our original brief we had not seen the brief of respondents. Having now received same we feel it necessary to make brief response to certain statements contained therein, particularly as to matters considered by the Interstate Commerce Commission.

The statement is made, at page 17, that "petitioners here are simply trying to make the case they made before the Commission into a different case in this Court," and it is said, over and over again, that there was no question before the Commission involving the reasonableness of rates, nor any question respecting the reasonableness of routes (See page 3—also page 10).

It is also urged that if petitioners desired to raise the question of routes they should have applied to the Commission for the exercise of its power under paragraph 3, of Section 15, of the Interstate Commerce Act, to establish through routes (p. 14).

It is true that petitioners did not claim that the through joint rates via the routes by which they apply were unreasonable; nor did they claim that the routes via which said rates applied were unreasonable. Their claim was that the routes via which the combination rates applied were reasonable routes, already established, and that the construction and application of the tariffs, for which the carriers contended, would result in the commercial closing of those routes by increasing the rates applicable thereby.

Prior to the institution of proceedings by these petitioners, the carriers had sought to amend their tariffs so as to make the Combination Rule applicable only where there was no joint rate via any route and the Commission had declined to permit such amendment (R. 39). Among other reasons which the Commission gave for its refusal to permit the amendment, was the fact that such amendment would serve to increase the rates via the combination routes and that such increases had not been justified.

In view of the oft-repeated statement in respondents' brief, that there was no administrative question involved before the Commission and no question of rates or routing, it becomes necessary to quote from the Commission's reports. The following extracts from the Commission's original report in the proceeding

brought by petitioners, 142 I. C. C. 521 (R. 40), will serve to show the issues involved and the questions considered:

> "These complaints, filed on various dates from April 11, 1925, to January 21, 1926, are brought on behalf of numerous individuals, partnerships, and corporations, engaged in the manufacture and sale of lumber and other forest products. Collectively they bring in issue the reasonableness and the applicability under the published tariffs of the rates and charges collected on carload shipments of lumber and other forest products taking lumber rates from points of origin east of the Mississippi River and south of the Ohio and Potomac Rivers and from points of origin in Arkansas and Louisiana to destinations on and east of the Mississippi River, principally in central territory. Certain of the shipments are also alleged to have been misrouted.
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> "* * * The issues presented are whether the joint rates applied over all the routes, and, if not, whether the applicable rates over the routes over which the joint rates did not apply were the lowest full combinations of separately established factors by such routes, or the lowest rates resulting from the application of the combination rule to such factors.
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> * * * * * * *
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> "Included in the above are certain shipments which were reconsigned in transit. Such shipments are through shipments and, under the tariffs here considered, were subject to the same

transportation rates as were applicable on other through shipments.

"Specific routings were shown in connection with the joint rates. In addition, some of the tariffs contained the following note:

"The routing shown is that ordinarily and customarily used, and should be strictly observed by agents. If, from any cause, shipments are routed by carriers via other junction points but over the lines of carriers parties to this tariff, rates published herein will apply.

* * * * * * *

"Defendants contend that the preferred routing clause gave the carriers the privilege of using any route embracing the lines of carriers parties to the tariffs, and applying the joint rates. For example, they contend that the legal rate from Laurel, Miss., to Columbus, Ohio, over the Gulf, Mobile & Northern to Ackerman, Miss., and the Illinois Central and its connections beyond was the joint rate of 43 cents. No joint rate was provided for specific application over this route, but the carriers embraced in this route were all parties to the joint-rate tariff, which carried the preferred-routing clause. Complainants claim a rate of 40.5 cents, which is the combination rate produced by the combination rule.

* * * * * * *

"* * * Defendants' position with respect to the preferred-routing clause is untenable.*

"We have uniformly held, in cases where tariff situations similar to those here considered were

*The contention by the carriers that they had the right, under the Preferred Routing Clause, to apply the joint rate via all routes, which was presented to and decided by the Commission, has been abandoned by the carriers.

presented, that the combination rule is applicable in the absence of a joint rate over the route traversed regardless of the fact that joint rates were applicable over other routes. Cancellation Rule for Combination Rates, 93 I. C. C. 614; M'Gowin-Foshee Lumber Co. v. A. F. & G. Ry. Co., 95 I. C. C. 451; Moore Marshall Lumber Co. v. N. O. & N. E. R. R. Co., 112 I. C. C. 33; Gunther & Co. v. L. & N. R. R. Co., 112 I. C. C. 387. The arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holdings on this question.

* * * * * * *

"* * * We do not consider that the particular circumstances of these cases justified the use of the routes over which the higher rates were applicable."

It will be noted that the Commission, in overruling the contention of the carriers, refers to its previous decisions construing and applying the Combination Rule, and states that while it has carefully considered the defendants' contentions here, it finds nothing therein which warrants a reversal of its previous holdings on the question. The Commission did not restate the reasons for its previous ruling and it therefore becomes necessary to examine the previous reports, referred to, in order to ascertain all of the grounds upon which the Commission bases its ruling. It will only be necessary, however, to refer to the reports in which the Commission rejected the applica-

tion of the carriers to amend the rule by inserting the words "via any route," so as to restrict the application in the manner that the respondents here urged. The original report, by Division 3 of the Commission, on this application, is found in 81 Interstate Commerce Commission reports, page 745, and we call the Court's attention to the following extracts therefrom:

> "By schedules filed to become effective April 28, 1923, and later dates, respondents propose to restrict the application of the so-called combination rule for constructing lumber rates from the Mississippi Valley and southeastern points of origin to Ohio and Mississippi River crossings when the shipments are destined for points beyond these crossings.
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> * * * * * * *
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> "The rule for constructing combination rates, the application of which respondents seek to restrict, is published in Agent Jones' tariff I. C. C. U. S. 1. They propose to confine its application to movements from origin to destination points where there are no through rates in effect via any route. The rule originated with the Director General of Railroads and was originally published in compliance with freight-rate authority No. 10. It provided for the application of single increases to the combination rates where no through rates were in effect from point of origin to destination. The application of this rule has in many instances resulted in lower rates than were applicable under the published through rates. It has been and is possible under the rule to divert shipments at

points and over routes that were not available before its publication.

* * * * * * *

"It is the contention of respondents that under the tariffs as they now read the Jones basis for making combination rates is not available where joint through rates are in effect. They state that their purpose in publishing the suspended items was merely to clarify something that is already in the tariffs, and not to change them. The fact that both the carriers and the shippers have in the past put a different construction on the application of this combination rule, and the further fact that respondents now deem it necessary to call attention to this new interpretation of it, would indicate that whether so intended or not the proposed schedules are in effect a modification of the tariffs.

"Respondents assert that if the Jones rule for constructing combinations is employed where there is a through rate in effect via any route, they will be deprived of the advances allowed them under General Order No. 28 and the general increases of 1920. They urge with force that the carriers are entitled to these advances, but General Order No. 28 and the general increases of 1920 did no more than allow increases on the traffic hauled. *Neither was intended to control routing.**

* * * * * * *

"It is urged by respondents that if these suspended items be allowed to become effective they will clarify the situation, prevent confusion, preserve the revenue of the carriers, and result in no

*Italics are ours throughout.

increase in rates or inconvenience to the shipper. Exhibits offered by protestants show many instances in which *increases* would result.

* * * * * * *

"Protestants further maintain that the language of the rule in the Jones tariff for constructing combination rates clearly indicates that such rates are invariably applicable unless there is a joint through rate in effect over the route of movement. *This, in our opinion, has been the generally accepted interpretation of the rule, and much traffic has moved over the so-called unauthorized routes under this interpretation since the inception of the rule.*"

The carriers moved the Commission for reconsideration by the entire Commission, which was granted, and the case reargued before the entire Commission. The report of the Commission, on such reargument, is found in 93 Interstate Commerce Commission reports, page 614, and we call the Court's attention to the following extracts from this report:

"Respondents on reargument present no new facts and have done little more than restate and emphasize the contentions and arguments contained in their original brief. It clearly appeared from the evidence introduced by protestants that the schedules proposed by respondents would in many instances result in *increased* lumber rates over so-called unauthorized routes, *and that there were both actual and potential movements over some of these routes. Respondents made no attempt either at the hearing or on reargument to justify these increased rates.* They apparently

rely largely upon an interpretation of the combination rule, with which we can not agree, to justify the restriction to the rule which they propose.

* * * * * * *

"* * * We affirm our original finding that a tariff provision such as was proposed and suspended would have the effect of *increasing* the lumber rates from the Mississippi Valley and southern points of origin to Ohio and Mississippi River crossings and that *respondents have not justified these increased rates.*

* * * * * * *

"* * * But, as we have pointed out, the record shows that if the proposed schedules had been allowed to become effective, certain of the rates involved would *have been increased.* We have found in a number of cases that the mere desire to eliminate the combination rule is not a justification *for increased rates.*"

It will be seen from the foregoing quotations that the Commission declined to permit the carriers to amend the tariffs so as to restrict the application of the Jones Rule, as they here assert it is restricted, and that in reaching its decision that the rule applied to route of shipment the Commission considered various questions that were peculiarly and exclusively within its province. Among such questions were the following:

(a) The restriction of the routes by increasing the rates over certain routes so as to commercially close such routes.

(b) Restricting the right to divert shipments.

(c) The matter of increasing rates by the combination routes, which the Commission held the carriers had not justified.

(d) The question as to whether the so-called "preferred routing clause" in the tariffs made the joint rates applicable via routes not specified in connection with such rates.

(e) Assuming the application of the Combination Rule, whether the carriers were nevertheless justified in using the routes over which the higher rates were applicable.

It is true the Commission did not repeat all of these considerations in its report in the case at bar, but it based its conclusions on these previous rulings by reference to such rulings and by the statement that "the arguments advanced by defendants in this proceeding in support of a contrary conclusion have been carefully considered, but we find nothing therein which warrants a reversal of our previous holding on this question."

It is therefore submitted that a review of the opinions of the Commission establish that its determination of the question involved required administrative action and the consideration of the matter of the justification for increasing rates by the routes via which the combination rates applied and the propriety of commercially closing such routes.

THE STATEMENT IN RESPONDENTS' BRIEF, THAT THE PURPOSE OF THE RULE WAS TO PROTECT SHIPPERS WHO WERE SHIPPING FROM POINTS WHERE NO THROUGH RATES WERE IN EFFECT (pp. 6 and 43), IS NOT CORRECT.

This statement is made without qualification and it is the basis for the argument that the Interstate Commerce Commission and the petitioners are undertaking to have the rule applied to accomplish a purpose for which it was never intended. There is no basis for such a statement except the assumption of the pleader. The Interstate Commerce Commission stated that the purpose of the rule was "to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts" (R. 45).

The Commission further stated that the increases granted were to apply "on the traffic hauled" and were not "intended to control routing." If the carriers' contention here is sustained, the result will be that carriers would control routing by confining the movement to the routes specified in connection with the joint rates. In view of these findings of the Commission it cannot be said that the sole purpose was to protect shippers who were shipping from points from which no published through rates were in effect.

THE RESPONDENTS' STATEMENT THAT THE COMBINATION RULE IS UNAMBIGUOUS IS CONTRADICTED BY RESPONDENTS' ACTION.

On page 24 of respondents' brief, it is stated that "there is no ambiguity in the language, * * * it does not give rise to any reasonable doubt. The language is just as clear as a bell and means just what it says and says just what it means." We desire to call the Court's attention to the fact that the record shows that prior to 1923 respondents, as well as other carriers, and the shippers construed the rule to apply as here contended by petitioner. It further shows that in 1923 the respondents attempted to amend the rule by inserting the words "via any route," so as to make it read as respondents now claim it should be interpreted to read. If "the language is just as clear as a bell" it certainly could not be made clearer. It is therefore submitted that the actions of respondents estop them from now claiming that there is no ambiguity in the rule.

CONCLUSION.

We will not undertake to argue any of the legal questions involved but we feel justified in asking permission to file this brief reply to certain statements made in respondents' brief.

Respectfully submitted,

J. V. NORMAN,
Counsel for Petitioners.

Dated at
Louisville, Ky.,
November 23, 1936.